



## Region 10 Briefing Paper for the Office of the Regional Administrator

**MEETING/EVENT TITLE:** Waters of the United States (WOTUS)/High Tide Line (HTL)

**MEETING DATE:** Tuesday, December 19<sup>th</sup> 1:30-2:30 PM

**LOCATION:** ET Conference room

**PREPARED BY:** Heather Dean, Ashley Palomaki, Michael Szerlog

**DATE:** Monday, December 18<sup>th</sup>

**ATTENDEES:** Chris Hladick, Michelle Pirzadeh, Dan Opalski, David Allnutt, Peter Murchie, Michael Szerlog, Heather Dean, Ashley Palomaki.

**EXTERNAL PARTICIPANTS:** NA

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### I. REQUESTING OFFICE

OERA/OWW

### II. TIMING

Per request of RA due to possible action from Army Corps Division

### III. PURPOSE

To provide a "high level" presentation about the Clean Water Act Waters of the United States (WOTUS) and High Tide Line (HTL) to the Regional Administrator for situational awareness.

### IV. BACKGROUND/HISTORY

#### WOTUS background/history:

- The definition of "waters of the United States" currently in effect is the definition promulgated in 1986/1988, implemented consistent with subsequent Supreme Court decisions and guidance documents. The 2015 revised regulatory definition of "waters of the United States" has been stayed by the U.S. Court of Appeals for the Sixth Circuit. In response to this stay, EPA, Department of Army, and the Army Corps of Engineers resumed nationwide use of the agencies' prior regulations defining the term "waters of the United States." On February 28, 2017, the President of the United States issued an Executive Order directing EPA and Department of the Army to review and rescind or revise the 2015 Rule. EPA, Department of Army, and the Army Corps of Engineers are in the process of reviewing the 2015 rule and considering a revised definition of "waters of the United States" consistent with the Executive Order
- 1986/1988 Regulatory Definition of "Waters of the United States"
  - 40 CFR 230.3(s) The term waters of the United States means:
    - 1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
    - 2. All interstate waters including interstate wetlands;
    - 3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect

interstate or foreign commerce including any such waters: a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

- b. (From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - c. Which are used or could be used for industrial purposes by industries in interstate commerce;
- 4. All impoundments of waters otherwise defined as waters of the United States under this definition;
- 5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- 6. The territorial sea;
- 7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
- Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Guidance Documents on the Definition of "Waters of the United States"
  - Rapanos v. United States & Carabell v. United States
    - In 2007 and again in 2008, the agencies developed guidance for implementing the above definition of "waters of the United States" under the Clean Water Act following the Rapanos v. United States, and Carabell v. United States Supreme Court decision.
  - Solid Waste Agency of Northern Cook County (SWANCC) v. United States
    - In 2001 and again in 2003, the agencies developed guidance to address the above definition of "waters of the United States" under the Clean Water Act following the SWANCC Supreme Court decision.
- Memoranda
  - 1989 Memorandum of Agreement - Allocates responsibilities between EPA and the Corps for determining the geographic scope of the Section 404 program and the applicability of exemptions from regulation under Section 404(f).
  - 1979 "Civiletti" Memorandum - U.S. Attorney General opinion on ultimate administrative authority under Section 404 to determine the reach of navigable waters and the meaning of Section 404(f).
  - Clean Water Act Section 404 and Agriculture - Includes the 1990 Memorandum to the Field and the Memorandum withdrawing the Interpretive Rule.

#### **HHTL background/history:**

- In the absence of adjacent wetlands, the HTL is the geographic limit of Clean Water Act (CWA) jurisdiction in tidally influenced waters. The placement of fill material below the HTL requires authorization from the Corps of Engineers.
  - Regulatory Definition (e.g., 33 CFR 328.3(c)(7)):
    - Maximum height reached by rising tide
    - Encompasses spring high tides [see below] & other high tides that occur with periodic frequency

- Does not include storm surges in which there is a departure from the normal or predicted reach of the tide
- May be determined, in the absence of actual data, by:
  - Oil or scum line along shore objects
  - More or less continuous deposit of fine shell or debris on foreshore or berm
  - Other physical markings or characteristics
  - Vegetation lines
  - Tidal gages
  - Or other suitable means that delineate the general height reached by a rising tide
- The Corps promulgated the regulatory definition of HTL in 1977, five years after passage of the CWA.
- The definition and preamble explanation thereof clearly establish that the HTL is higher than the mean higher high water mark (MHHW), but many Districts, including Seattle (and Portland) began using MHHW prior to the rulemaking and continue to do so today.

## Ex. 5 - Deliberative Process

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